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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOEL P. ESCOBEDO, Defendant and Appellant.	B168418 (Los Angeles County Super. Ct. No. TA067183)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Affirmed.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Joel P. Escobedo.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Lawrence M. Daniels, Deputy Attorney General, for Plaintiff and Respondent.

Appellant, Joel P. Escobedo, was charged with four counts of committing a lewd act upon a child. A jury found appellant guilty on all four counts. The court sentenced him to a prison term of 10 years as follows: a mid-term of six years on Count IV as the principal term, consecutive terms of two years each under Counts II and III, and a concurrent term of six years on Count I. Appellant contends the trial court prejudicially erred when it excluded evidence of victim's diary and prior reports of abuse. He also contends the trial court erred in instructing the jury with CALJIC NO. 2.21.2 and for not holding a *Marsden* hearing at sentencing. Finding no error, we affirm.

FACTS AND PROCEEDINGS BELOW

J.D. was born in February 1991. In July 2002, J.D. lived in a foster home operated by Teresa Franco in Compton with her two younger sisters, Franco's husband and Franco's three children.

Appellant, who was Teresa Franco's cousin, visited the Francos' house two to three times a week. J.D. testified that on July 12, 2002 appellant walked into her room while she was sleeping, woke her up, gave her some money and told her to be quiet. Then, appellant kissed J.D. on her mouth and put his tongue in her mouth and continued to kiss her for a couple of minutes. The next night appellant again came into J.D.'s room, gave her money, told her to be quiet, and put his tongue in her mouth. Appellant pulled up J.D.'s shirt and kissed J.D.'s breasts for a couple of minutes while he put his hand down J.D.'s pants and rubbed her vagina. On the third night, appellant came into J.D.'s room while she was sleeping, gave her money, and again kissed her on her mouth and breasts while he touched her vagina.

On the fourth consecutive night, appellant walked into J.D.'s room while she was sleeping. After kissing J.D., appellant told her to go down to the garage. In the garage, appellant got on top of J.D. and moved his body around for a long time. Appellant grabbed J.D. and moved her around and said he "wanted something to come out." That afternoon, J.D. told a friend at school what appellant had done to her in the garage. The

friend's mother found out about this and took J.D. to the police. J.D. spoke with Deputy Shackelford about what had happened and gave the officer the money appellant had given her.

On October 30, 2002, a few months after J.D. started living in a new foster home, Detective Ruiz talked to J.D. about what happened. J.D.'s account was consistent with what she had told Deputy Shackelford. When Detective Ruiz contacted Mrs. Franco by telephone, she denied appellant, who was her cousin, ever visited her home and insisted he had never spent the night.

Appellant later called Detective Ruiz. During their phone conversation, appellant denied ever visiting the Francos.

On November 4, 2002, appellant and Mrs. Franco arrived at the police station to meet with Detective Ruiz. When Detective Ruiz confronted Mrs. Franco with J.D.'s statements appellant had stayed in the garage, she became upset and admitted appellant had stayed in the house. She said she had lied because she was scared of losing her foster care license and apologized to Detective Ruiz. In the taped conversation with Detective Ruiz, appellant initially denied ever being in Mrs. Franco's house. He then changed his story and admitted he had been at the house having dinner around the time of the incidents, but still denied ever touching J.D. At trial, appellant admitted he lied to Detective Ruiz when he told the officer he had never been inside the house.

In November 2002, J.D. spoke with the prosecutor with Detective Ruiz present. During this interview, Detective Ruiz asked J.D. if she kept a diary. J.D. said she did and it documented some but not all of what appellant had done to her. On November 6, 2002, Detective Ruiz went to J.D.'s house and obtained her diary.

After reading the diary, the trial court decided only four pages discussed the incidents involving the appellant and the remaining pages were not relevant to this case. Furthermore, because the four pages were consistent with victim's testimony, the court allowed defense counsel to quote from the relevant four pages and cross-examine the victim about the diary but did not allow the diary itself to be admitted as evidence.

The trial court similarly did not allow Mrs. Franco to testify J.D. had told her she was removed from her biological mother because the latter sexually abused her. The court explained in order for defense counsel to establish a pattern of fabrication, he would have to submit evidence the reports of sexual abuse were false. Without such evidence, the testimony would be excluded as irrelevant.

DISCUSSION

Appellant contends the trial court abused its discretion in excluding the diary and Mrs. Franco's testimony regarding victim's reports of prior sexual abuse. As a result, appellant contends the trial court violated his 5th, 6th, and 14th Amendment rights to due process, to a fair trial, and to present a meaningful defense. Because the errors impinged on appellant's federal constitutional rights, appellant contends reversal is required unless the error can be said to be harmless beyond a reasonable doubt. Alternatively, appellant contends reversal is required even under the standards of prejudice governing errors of state law, because there is a reasonable probability of a result more favorable to appellant absent the court's error. Appellant further urges the trial court erred in giving CALJIC No. 2.21.2 and allowing the jury to evaluate the victim's testimony by a probability standard rather than proof beyond a reasonable doubt. Finally, appellant contends the court erred in failing to conduct a *Marsden* hearing during sentencing.

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING EVIDENCE OF J.D.'S DIARY AND MRS. FRANCO'S TESTIMONY THAT J.D. SAID SHE WAS REMOVED FROM HER BIOLOGICAL MOTHER BECAUSE OF SEXUAL ABUSE.

Appellant contends the trial court prejudicially erred by not admitting J.D.'s diary. Specifically, he argues the diary was relevant to his theory of fabrication and should have

been admitted under Evidence Code section 780.[1] He contends the jury needed to see the neater handwriting in earlier entries and the different color pens used in the diary to fairly evaluate J.D.'s credibility and the fabrication theory.

Under Evidence Code section 352, the trial court retains broad discretion in assessing whether the probative value is outweighed by concerns of undue prejudice, confusion or consumption of time.[2] Where, as here, a discretionary power is statutorily vested in a trial court, the exercise of that discretion should "not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."[3]

Here it cannot be said the trial court's decision was arbitrary, capricious, or patently absurd. The trial judge read the entire diary and found the diary was not relevant to the defense because the contents were consistent with the victim's testimony. Furthermore, defense counsel was allowed to quote from the diary and cross-examine J.D. about the truthfulness of the contents in the diary. Appellant fails to show why it was necessary for the jury to see the actual diary. The trial court also rejected appellant's claim the different color pens used to describe the molestations support the fabrication theory by noting different color pens were used throughout the entire diary. From the records available to us, we cannot say the diary would have contributed anything of probative value. Therefore, the trial court did not abuse its discretion in excluding the diary.

Similarly, the trial court's decision to exclude Mrs. Franco's testimony that J.D. told her she was removed from her biological mother's care because of sexual abuse was not arbitrary, capricious, or patently absurd. Appellant contends the testimony was

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[1] Evidence Code section 780 provides in part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing…"

[2] *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.

[3] *People v. Jordan* (1986) 42 Cal.3d 308, 316.

relevant to show J.D.'s tendency to fabricate stories of sexual abuse to get out of living situations she does not like. This argument fails because appellant was unable to proffer any evidence J.D.'s claims of sexual abuse by her biological mother were untrue. Without such evidence, Mrs. Franco's testimony cannot support the defense's theory J.D. fabricated the charges against appellant. Thus, the court did not abuse its discretion in excluding the irrelevant testimony.

Even assuming there was an abuse of discretion, reversal is not warranted. The evidence against appellant was compelling. J.D. gave consistent accounts about the incident in two police interviews, at trial, and in her diary. In contrast, appellant twice lied to the police claiming never to have been inside the Franco home and admitted these lies during trial. In light of such disparity in credibility between the only two witnesses to the incidents, it is not reasonably probable a result more favorable to appellant would have been reached had the evidence been admitted.[4] The physical diary had little probative value considering defense counsel cross-examined J.D. about the diary by quoting extensively from it. Also, even if Mrs. Franco's testimony had been admitted, it would have had little effect on the outcome of the case because there was no evidence suggesting J.D. had not been sexually abused in the past. For these reasons, we cannot say there was a miscarriage of justice. As to appellant's constitutional claims, appellant waived them by failing to object on those grounds at trial.[5]

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[4] *People v. Watson* (1956) 46 Cal.2d 818, 836 held that, 'A miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

[5] *People v. Burgener* (2003) 29 Cal.4th 833, 886 held that, "It is elementary that defendant waived these [constitutional] claims by failing to articulate an objection on federal constitutional grounds below."

II. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY WITH CALJIC NO. 2.21.2.

The trial court instructed the jury with CALJIC No. 2.21.2 which provides: "You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." Appellant contends the trial court erred because the instruction lowered the People's burden of proof by allowing the jury to evaluate the testimony of appellant and prosecution witnesses by a probability standard instead of the "beyond a reasonable doubt" standard.

In *People v. Beardslee*, the California Supreme Court rejected this very argument.[6] The Court explained this instruction does not alter the burden of proof and "is merely a statement of the obvious—that the jury should refrain from rejecting the whole of a witness's testimony if it believes that the probability of truth favors any part of it."[7] We are bound by the California Supreme Court's authority. The instruction was properly given.

Appellant's contention the jury may have erroneously applied this instruction to the victim's pivotal testimony has no merit. The only material facts to which J.D. testified were the incidents appellant was charged with. If the jury had found J.D. had willfully testified falsely, it would have acquitted appellant without further ado. Thus, CALJIC No. 2.21.2 could not have affected the jury's evaluation of J.D.'s testimony.

III. THE TRIAL COURT PROPERLY DID NOT HOLD A *MARSDEN* HEARING AT SENTENCING.

Appellant contends the trial court deprived him of due process of law by failing to hold a *Marsden* hearing at sentencing to inquire into appellant's botched attempt to

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[6] *People v. Beardslee* (1991) 53 Cal.3d 68.

[7] *People v. Beardslee, supra,* 53 Cal.3d at page 95.

accept a plea offer. We reject such a contention for two independent and sufficient reasons.

On the day of trial, appellant attempted to accept the people's one-year plea offer. Due to some miscommunication, appellant and the prosecutor were unable to reach an agreement. After the jury's guilty verdicts, the probation officer filed a supplemental probation report indicating appellant related the following during an interview.

"The jury said he touched a young girl but he denies doing anything. . . . He claims that he told his public defender he did not want to plead guilty but his public defender was not listening to him. . . . He claims he would have accepted the plea bargain of one year county jail but he always denied being guilty.

At sentencing, the following exchange occurred between the trial court, prosecutor, and defense counsel clarifying the probation report:

> THE COURT: . . . Well Mr. Nakano [defense counsel], what do we do then as far as sentencing? What is your argument as to that?
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> [DEFENSE COUNSEL]: Well, you know, I'm in a quandary. I know the Court may or may not be interested, but originally we were offered a year on a plea to any one of the counts. And after negotiations -- this was a rather long preliminary hearing in court -- we came to the point where my client was offered one year on a plea to one count. But when I explained to him that this was a crime that if he pled to even though --
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> [THE PROSECUTOR]: I'm going to object because I don't think it's proper to talk about at this point what the pretrial negotiations were.
>
> [DEFENSE COUNSEL]: It's in the probation report.
>
> [THE PROSECUTOR]: I don't think we should consider the pretrial negotiations.
>
> THE COURT: His client does mention something about those in the supplemental report, so just for the record I don't know that I ever knew -- I mean, actually it's of no interest to me what the pretrial negotiations were.
>
> [DEFENSE COUNSEL]: We never told you.

THE COURT: So I don't know that I knew it. He mentioned it in the supplemental report. If you want to briefly go into that, go ahead.

[DEFENSE COUNSEL]: Because my client mentioned that and he said I didn't let him take the one year.

THE COURT: Right.

[DEFENSE COUNSEL]: Well, in order to make the record clear on that, we had negotiated that if the prosecutor got approval, he could plead to some other count and the one year would be open on the date of trial. I told my client that there was nothing forthcoming that was going to change. He indicated to me that he wanted to take the one year. At that time I was then informed the year was off the table because it was the trial date. Implicitly I figured that since --

THE COURT: Well, that clarifies the supplemental report so let's talk about --

Under these circumstances, the trial court had no duty to hold a *Marsden* hearing. As pointed out in *People v. Leonard* "a trial court's duty to conduct the inquiry arises, 'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.'"[8] Not once during the trial nor at sentencing did appellant express to the court directly or by implication he considered his counsel's performance was inadequate. Consequently, the trial court had no duty to hold a *Marsden* hearing.

Alternatively, even if appellant had complained at sentencing about the miscommunication with counsel which led to his failure to accept a plea bargain before trial, the *Marsden* motion would have been untimely. *People v. Whitt* held the lower court could have denied a *Marsden* motion as untimely because "[t]he court was not required to stop the nearly completed proceedings in its tracks in order to allow another

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[8] *People v. Leonard* (2000) 78 Cal.App.4th 776, 787, citing *People v. Molina* (1977) 74 Cal.App.3d 544, 549.

attorney to completely familiarize himself with the case."[9] In this instance, even had appellant made a proper *Marsden* motion, replacing counsel during sentencing would have been ineffectual. Even on appeal appellant is not complaining about his attorney's performance at trial or challenging his suitability to represent him in the sentencing phase. Instead he is complaining about a plea offer, which is inherently only available before trial. Replacing counsel at this stage would not reopen that offer and would only have unnecessarily delayed the proceedings and wasted public resources.

For either or both of the above reasons, we conclude there was no reason for the trial court to hold a *Marsden* hearing and this claimed error fails also.

DISPOSITION

The judgment is affirmed.

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JOHNSON, J.

We concur:

PERLUSS, P.J.

ZELON, J.

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[9] *People v. Whitt* (1990) 51 Cal.3d 620, 628.